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In The

# Supreme Court of the United States

LAURIE (LAWRENCIA) BEMBENEK,

*Petitioner,*

v.

STATE OF WISCONSIN,

*Respondent.*

**On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals District I**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Laurie Bembenek obtained compelling new evidence of actual innocence during a post conviction DNA motion. This powerful new evidence now proves that Ms. Bembenek was wrongfully convicted of the murder of Christine J. Schultz. Despite new evidence of innocence and proven constitutional violations, Ms. Bembenek still stands convicted of a crime she did not commit. In dismissing Ms. Bembenek's appeal, the Wisconsin State Court held that her prior no contest plea barred the post conviction DNA motion and appeal and forever barred a remedy.

This case presents three questions for review:

I. Does the newly discovered DNA and ballistics evidence constitute a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* and *House v. Warden* sufficient to warrant reversal of Ms. Bembenek's conviction?

II. Does newly discovered evidence of actual innocence and proven constitutional violations entitle Ms. Bembenek to be exonerated of a crime she did not commit?

III. Are Ms. Bembenek and other similarly situated no contest and guilty plea defendants entitled to post conviction DNA access and remedies?

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The opinion of the Wisconsin Court of Appeals (Appendix A) is found at 2006 WI App. 197. The decision of the Wisconsin Trial Court (Appendix B) and decision of the Wisconsin Supreme Court denying review (Appendix C) were not reported.

## JURISDICTION

On January 22, 2008, the Wisconsin Supreme Court filed its opinion affirming the Court of Appeals decision and denying petitioner's timely petition for review. This Court has jurisdiction under 28 U.S.C. § 1257.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

> life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

## STATEMENT OF THE CASE

### Introduction

Powerful new evidence of actual innocence proves that Petitioner Laurie Bembenek was wrongfully convicted of the murder of Christine J. Schultz. Yet, she remains unable to reverse her conviction despite meritorious constitutional claims based upon the Wisconsin State Court's flawed application of her prior no contest plea.

In 1982, the district attorney in Milwaukee, Wisconsin successfully argued to a jury that Laurie Bembenek had intentionally killed Christine Schultz. The district attorney argued that acting alone, Ms. Bembenek invaded the home of her then husband's ex-wife, Christine Schultz, and shot her once in the back. At the time of the murder, Bembenek's husband Elfred Schultz was employed as a Milwaukee Police Department detective.

Based upon a ballistics match between the murder bullet and a gun kept in the Bembenek/Schultz

apartment at the time of the murder, the District Attorney would argue that Laurie Bembenek was the murderer because only she had access to the murder weapon on the night of the murder. The murder bullet was identified as a special bullet manufactured specifically for the Milwaukee Police Department. The ballistics evidence, the prosecution would argue, proved beyond any reasonable doubt that Laurie Bembenek had murdered Christine J. Schultz in order to eliminate alimony payments being made by her husband, Elfred Schultz, a Milwaukee police officer.

Identity was at issue during the trial. Eye witness testimony from the victim's sons identified the murderer as a heavyset white male, not Laurie Bembenek. Ms. Bembenek would also testify that she did not commit the murder and was home alone sleeping at the time of the murder. The twelve jurors discounted the eye witness testimony of the male murderer and returned from deliberations convinced of Ms. Bembenek's guilt.

Not a single person on that jury heard about the powerful new evidence of actual innocence uncovered during Ms. Bembenek's 2002 DNA motion. The jurors did not hear that there actually was no ballistics match between the murder bullet and the gun kept in the Bembenek/Schultz apartment at the time of the murder. The jurors did not hear that Ms. Bembenek's DNA was not present on crime scene evidence. The jurors did not hear that male DNA was present in the sexual assault specimens retrieved from the body of

the victim. The jury was also unaware that the State had exculpatory evidence of the sexual assault of the victim and exculpatory evidence that the true ballistics match was with another gun, a gun Ms. Bembenek did *not* have access to on the night of the murder.

Now, more than two decades later, Laurie Bembenek, an innocent woman, cleared by DNA and ballistics evidence and exculpatory evidence previously withheld by the State, still stands convicted of a crime she did not commit. She remains an innocent victim of a no contest plea obtained in 1992 while she was in solitary confinement. That plea allowed her to maintain her innocence and to be immediately released from prison.

Despite the compelling new evidence of actual innocence, the Wisconsin Court illogically concluded that the prior no contest plea prevented Ms. Bembenek from pursuing post plea DNA testing, the post plea appeal, and forever barred a remedy. In reaching its decision, the Court eviscerated Wisconsin's new DNA statute and the State of Wisconsin's 2002 agreement with Ms. Bembenek allowing her to pursue post plea testing "as long as she paid for it." Because this Court's published decision now applies to all Wisconsin prisoners convicted on the basis of no contest pleas, the Wisconsin Court has not only closed the courthouse doors to Ms. Bembenek, but has also forever closed the doors on all other similarly situated no contest plea defendants.

## State Court Proceedings: The Crime and Its Investigation

Christine J. Schultz was murdered lying face down in her bed by a single gunshot to the back on May 28, 1981. The victim's children were at home at the time of the murder and reported that a ***heavyset man*** had come into their bedroom, attacked the eldest child, and then abruptly left. Shortly after this incident, the children heard an explosive sound coming from their mother's bedroom, again saw the murderer run past them, and found their mother lying face down on her bed, bleeding from the back. She had a gag in her mouth and a rope looped through the fingers of one hand.

Ultimately, false ballistics evidence overshadowed other evidence which supported the conclusion that Schultz' ***off-duty gun*** was ***not*** the murder weapon. Within hours of the murder, two detectives testified they were sent to the Bembenek/Schultz apartment to check the ***off-duty gun*** and found it to be dusty, dirty, fully loaded, containing no blood or body tissues, and ***not*** recently fired. Wisconsin crime lab scientific testing of the ***off-duty gun*** in 1981 also confirmed that the ***off-duty gun*** contained no blood or body tissues. The Milwaukee County Associate Medical Examiner Dr. Samuels opined that the victim's gunshot wound had been created by a gun in "direct contact" with the body, and therefore, the murder weapon should have contained blood from the victim.

The false ballistics match overshadowed even eyewitness identification of the murderer as a ***heavyset man, not Ms. Bembenek***. The victim's son, Sean Schultz (age 11), saw the murderer on two occasions on the night of the murder and described the murderer as a **tall, heavyset male, not Ms. Bembenek,** with ***a man's hand, a man's voice,*** and ***much bigger than Ms. Bembenek***.

Ms. Bembenek's identity as the murderer also sharply conflicted with the Milwaukee Police Department's initial description of the murderer. In the early weeks following the murder the police issued an all points bulletin to Wisconsin and Illinois authorities describing the murderer as a:

> **"WHITE MALE, 5'8" TO 5'10", HEAVY BUILD, REDDISH-BROWN HAIR PULLED BACK INTO A PONYTAIL, SUSPECT HAD SOME TYPE OF WHITE COVER OVER HIS LOWER FACE, SUSPECT HAD ON A GREEN JOGGING SUIT (JACKET AND PANTS). JACKET HAS YELLOW AND WHITE STRIPES ON SLEEVES, DIRTY TAN LEATHER GLOVES."**

During the weeks following the murder and prior to the ballistics match, the Milwaukee Police searched for a "male suspect" and investigated other sexual assault cases in connection with the Schultz murder. The search for a heavyset white male would abruptly stop twenty-one days later when a ballistics

match was reported by the Wisconsin Crime Lab and Ms. Bembenek was arrested.

**State Court Proceedings: The Trial**

Despite the eyewitness identification of the murderer as a heavyset male and weeks of search for a male suspect, the State proceeded with a case against Ms. Bembenek based on a web of highly circumstantial evidence: a wig, green jogging suit, red and blonde hairs, rope, and Elfred Schultz' ***off-duty gun***, a gun kept in the apartment where Ms. Bembenek slept on the night of the murder. The highly circumstantial case was held together by a key piece of evidence, ballistics testing of the ***off-duty gun*** (Trial Exhibit 125-three test-fired bullets) reported as a ballistics match with the murder bullet.

At trial, two state ballistics experts would testify to scientific certainty that bullets fired from Schultz' ***off-duty gun*** (Trial Exhibit 125) matched the murder bullet retrieved from the body of the victim. This ballistics testimony would seal Ms. Bembenek's fate since she alone was in the Bembenek/Schultz apartment where the ***off-duty gun*** was stored on the night of the murder.

Pointing to Ms. Bembenek and the gun during his closing, the Prosecutor argued:

> **"The victim was killed with a .38 caliber bullet . . .**

> **The bullet was determined to a reasonable degree of scientific certainty to have come from this gun. That was shown. There was testimony to that.** ***The bullet was proven to be, to a reasonable degree of scientific certainty, a 200-grain Speer bullet, a very unique bullet manufactured for the Milwaukee Police Department. And that's Exhibit-this bullet. It came from this gun. That's scientific evidence . . . Who had access to the gun? The defendant."***

After a lengthy deliberation, the jury convicted Ms. Bembenek of first-degree murder. At sentencing, the trial judge (i.e. Circuit Court Judge Michael Skierawski) again pointed to the ballistics match as the primary basis for sustaining the conviction stating:

> **"I have briefly commented that this case was undoubtedly the most circumstantial case that I have ever seen and commented that the individual pieces in and of themselves were not enough to convict this defendant of first degree murder beyond a reasonable doubt but taken as a whole those pieces and bits of circumstantial evidence,** ***principally the gun, the murder weapon in this case, wove an inescapable net of only one conclusion, only one person and that is the defendant."***

**Post Conviction John Doe and No Contest Plea**

Nine years after Ms. Bembenek's conviction, a John Doe proceeding was convened based upon serious concerns of evidence tampering raised by Ira B. Robins and former Milwaukee County Medical Examiner Dr. Chesley Erwin. Although the Doe hearing was secret, a report was issued that directly questioned the reliability of evidence introduced at trial, but left its resolution to another court at another time.

Shortly after this Doe report, Ms. Bembenek brought a motion for a new trial. Unaware that there was no ballistics match and that the test-fired bullets (Trial Exhibit 125) had been secretly destroyed by the State, Ms. Bembenek, who was in solitary confinement and suffering from severe panic attacks, accepted the District Attorney's offer to reopen the judgment of conviction and still maintain her innocence by pleading "No Contest" to second-degree murder. At the no contest plea re-sentencing, the Prosecution again falsely advised Ms. Bembenek and the Court that the evidence remained essentially the same and did ***not*** disclose exculpatory evidence and the fact that ballistics evidence necessary for conviction had been destroyed. In exchange for the plea, Ms. Bembenek was immediately released from prison and placed on parole.

**State Court Proceedings: 2002 DNA Motion**

Twenty-one years after being convicted of murder and now having fully served her sentence, Ms. Bembenek petitioned the Wisconsin Trial Court pursuant to Wisconsin's newly enacted DNA statute, Section 974.07 Wis. Statute, seeking DNA testing of crime scene evidence in an attempt to clear her name and the stigma of a felony conviction. As she had during her 1982 trial, three subsequent appeals, and 1992 no contest plea, Ms. Bembenek once again denied any involvement in the murder.

At the initial DNA motion hearing in 2002, the Milwaukee County District Attorney's office (represented by the same attorney involved in Ms. Bembenek's charging, post conviction motions, and 1992 no contest plea) *agreed* that Ms. Bembenek could bring this DNA motion to prove her innocence despite the prior no contest plea. The parties entered into a written stipulation that certain crime scene items could be tested provided Ms. Bembenek paid for the testing.

Relying upon the DNA Trial Court agreement, Ms. Bembenek retained DNA and ballistics experts to perform expensive testing all with the understanding that if this new evidence proved her innocence, her conviction could be reversed.

**Newly Discovered Evidence: Missing Bullet Evidence**

The DNA motion took a surprising turn when the Trial Court ordered production of the bullets (Trial Exhibit 125) introduced at trial and relied upon as a basis for the 1992 no contest plea. **When the bullets could not be produced, the District Attorney's Office finally disclosed that Trial Exhibit 125, (the ballistics evidence that convicted Ms. Bembenek) was missing and had been destroyed after a flood in 1986, six years *before* Ms. Bembenek's no contest plea.**

**Newly Discovered Evidence: No Ballistics Match**

Following the astonishing revelation of the missing bullets before the DNA court, the State agreed to new ballistics testing of the gun identified as the murder weapon at trial (the "***off-duty***" gun of Elfred Schultz) and comparison with the murder bullet. On May 23, 2003 new ballistics testing conducted at the Wisconsin Crime Laboratory jointly by Ms. Bembenek's expert and the State's expert produced surprising results. **The ballistics experts for both sides found no ballistics match with the off-duty gun. Scientific testing also confirmed the murder bullet had not been subjected to any destructive actions or conditions that would cause it to change; therefore, the current testing is a valid scientific finding.**

**Newly Discovered Exculpatory Evidence: Ballistics Match with Another Gun**

Ms. Bembenek also accessed exculpatory ballistics evidence that had been withheld by the State. Crime lab handwritten ballistics notes from 1981 facially report that the murder bullet was consistent with test-fired bullets from another gun, a gun that was not in Ms. Bembenek's possession on the night of the murder, and a gun that contained blood of the same type as the victim. Other exculpatory crime lab documents report that a second murder bullet was transported into the Wisconsin Crime Lab shortly before the 1981 ballistics testing that inculpated Ms. Bembenek. Since there was only one murder bullet which had already been delivered to the crime lab on May 29, authorities looked for but reported "No satisfactory explanation for the discrepancy among the Crime Lab documents relating to the bullet was forthcoming."

**Newly Discovered Evidence: Sexual Assault Male DNA**

The DNA testing produced additional evidence of innocence. While no Bembenek DNA was found on any of the crime scene evidence, male DNA was found on multiple sexual assault specimens retrieved from the body of the victim. Based upon Ms. Bembenek's request for comparison testing with known suspects, a hearing was held before the DNA court. Testimony at the hearing confirmed the presence of male DNA on the sexual assault specimens and confirmed that

exculpatory 1981 sexual assault findings had been withheld by the State. Based upon the new DNA findings, the pathologist who conducted the autopsy of the victim in 1981 now concludes that the murder of Christine J. Schultz was a ***"sexual assault/ homicide"*** committed by a ***"male."***

Ms. Bembenek's DNA court agreement resulted in evidence proving actual innocence and constitutional violations:

**1) A false ballistics match was used to secure conviction;**

**2) The false ballistics evidence used as the basis for conviction, (Trial Exhibit 125), was secretly destroyed by the State six years prior to the 1992 no contest plea;**

**3) MALE DNA found in the victim's sexual assault autopsy specimens supports the eye witness identification of the murderer as a male, not Ms. Bembenek, and resulted in the Associate Medical Examiner's reclassification of this murder as a sexual assault/ homicide committed by a male; and**

**4) 1981 exculpatory crime lab evidence had been withheld by the State at the trial and again during the no contest plea.**

Despite this powerful new evidence of innocence and constitutional violations, the DNA Trial Court

summarily dismissed Ms. Bembenek's motions requesting the State to undertake comparison DNA testing with known suspects and to vacate her conviction. Although the parties agreed that the testing resulted in scientific confirmation of the presence of male DNA in the victim's sexual assault specimens, the trial court speculated that the male DNA could "possibly" have been the result of contamination. The trial court then concluded that "the related ballistics testing is now unnecessary." In rendering its decision, the trial court refused to consider the Associate Medical Examiner's opinions and refused to consider the new ballistics results despite the trial court's previous admonition that "without the gun there was no case." The trial court also failed to address the newly found constitutional violations, the State's withholding of exculpatory evidence and illegal destruction of the false ballistics evidence used as the basis for conviction. [App.17-23]

**State Court Appellate Proceedings**

On appeal, the State abruptly breached its 2002 DNA court agreement with Ms. Bembenek and argued for the first time that Ms. Bembenek's no contest plea barred relief. The Court of Appeals then dismissed Ms. Bembenek's entire appeal holding that she had breached her 1992 no contest plea agreement by pursuing the DNA motion and appeal. Refusing to consider the evidence of actual innocence and constitutional violations that rendered the plea invalid, the

appellate court held that Ms. Bembenek's prior no contest plea forever barred any remedy. [App.1-16]

The Wisconsin Supreme Court denied review on January 22, 2008. A dissenting justice proffered that the appeal should be heard for two reasons: First, the Wisconsin Supreme Court has not set out a rule of law that is applicable to a defendant's waiver of appeal rights as part of a plea bargain. Second, the plain language of Wisconsin's DNA statute gives a petitioner the right to testing at their own expense and the Wisconsin Supreme Court had not decided whether a plea waives the right to DNA testing. As a result of this denial, the published Court of Appeals decision applies to all similarly situated Wisconsin no contest plea Defendants and bars them from relief even when there is evidence of actual innocence. [App.24-28]

## REASONS FOR GRANTING THE WRIT

There is no greater affront to the American system of justice than to imprison and then deny a remedy to a citizen wrongfully convicted of a crime. During the past two decades, the fallibility of our system of justice has been exposed. Recognizing the advancements of science and dedicated to correcting past mistakes, the Wisconsin Legislature enacted 2001 Wis. Act 16, which created a post conviction DNA remedy for all persons convicted of a crime. Sec. 974.07 Wis. Stat. (2001-2002). *See* Keith Findley,

*Wisconsin's New DNA Statute,* Wisconsin Lawyer, May 2002.

After fully serving a 20 year sentence and with the State's consent to DNA testing, Ms. Bembenek utilized this statute and uncovered powerful new DNA and ballistics evidence of "Actual Innocence." All of the evidence linking her to the murder has now been proven to be non-existent and patently unreasonable. Despite the compelling new evidence of actual innocence, Ms. Bembenek has been wrongfully denied a remedy based upon the State Court's flawed application of her no contest plea.

Ms. Bembenek urges this Court to grant certiorari. Doing so will permit this Court to clarify the standards to be utilized by courts across this country when evaluating post plea evidence of actual innocence and to determine whether no contest and guilty plea defendants automatically waive their rights to future scientific testing not available at the time of their plea. The need for this clarification cannot be overemphasized since DNA and other sophisticated testing has uncovered a staggering "catalog of appalling miscarriages of justice." *See* George F. Will, *Innocent on Death Row,* Washington Post, April 4, 2000.

As a result of new scientific forensic tests, exonerations of defendants convicted of serious crimes are no longer rare. The rate of exonerations increased sharply from about 12 a year through the early 1990's to an average of 43 a year after 2000. *See* Samuel

Gross, et al. *Exonerations in the United States 1989 Through 2003* at 1 (2004).

Supreme Court review will also permit the Court to establish the burden of proof required for "actual innocence" and to establish a rule of law as to whether a plea based upon false evidence and permeated with constitutional violations trumps new evidence of innocence.

## I. This Court Should Grant Certiorari to Clarify The Standards for Claims of "Actual Innocence"

The Bembenek case illustrates the hurdle facing defendants who can produce proof of "actual innocence." This case is timely. The Supreme Court has not ruled definitively on what meets the burden of proof for establishing a claim of "actual innocence" and whether a State violates minimal demands of due process when it fails to provide a remedy for those cases where "actual innocence" can be established.

### A. Bembenek's Freestanding Claim of Actual Innocence

Ms. Bembenek's new evidence does more than demonstrate a reasonable probability of a different result, it proves "actual innocence." Lacking any credible evidence, the State no longer possesses the necessary probable cause for Ms. Bembenek's indictment much less her conviction. This case presents the United States Supreme Court with that golden

opportunity to establish standards for DNA cases resulting in proof of "actual innocence."

The United States Supreme Court has not ruled definitively on whether a State violates the minimal demands of due process when it continues to punish a convicted prisoner who can conclusively demonstrate factual innocence. In *Herrara v. Collins,* 506 U.S. 390, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the Supreme Court considered the case of a death row inmate who sought to present newly discovered evidence of actual innocence. While rejecting Herrera's claim, the majority assumed "for the sake of argument in deciding [the] case, that a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional." More than a decade later, the Supreme Court was again asked to address whether a petitioner had shown a freestanding claim of innocence. Once again, the Court declined to resolve the issue, but concluded that "whatever burden a hypothetical freestanding innocence claim would require," that burden had not been met. *House v. Warden,* 547 U.S. 518, 555, 126 S.Ct. 2064, 2087, 165 L.Ed.2d 1, 32 (2006).

The Bembenek case presents this Court with the opportunity to conclusively establish the burden of proof required for claims of "actual innocence."

### B. Effect of Bembenek's Newly Discovered Evidence on Old Evidence

The Wisconsin decision erroneously held that Ms. Bembenek's prior no contest plea barred any appeal and remedy. In rendering its decision, the Wisconsin court ignored compelling new evidence of actual innocence.

#### New Evidence: The Gun

Ms. Bembenek's search for the truth during her DNA motion resulted in discovery of the false evidence that has plagued this case for decades. The ***off-duty gun***, the key evidence linking Bembenek to the murder, is *not* the murder weapon. Fabricated ballistics evidence relied upon by the State for conviction is missing, alleged to have been destroyed by the State **prior** to Bembenek's no contest plea. During the DNA motion testing, three ballistics experts found no ballistics match with the ***off-duty gun*** identified as the murder weapon. Other prominent forensic experts, Dr. Werner Spitz and Dr. Michael Baden, confirm the false ballistics match. Both experts also opine that the gun muzzle imprint on the victim's back is consistent with another gun tested at the Wisconsin Crime Lab after the murder (a gun that was covered with blood of the same type as the victim and a gun that was **not** in Bembenek's possession at the time of the murder).

**New Evidence: Male DNA**

The presence of male DNA in the victim's sexual assault specimens confirms what the State knew but failed to disclose to Ms. Bembenek, the victim's sexual assault specimens were positive. Although Bembenek's counsel had filed demands for all exculpatory evidence, the State withheld this evidence. This wrongfully concealed sexual assault evidence directly impacted the conviction as it would have supported the eye witness identification of the murderer as a male, not Bembenek.

During Ms. Bembenek's 2002 DNA motion, evidence of this exculpatory sexual assault evidence was proven. Orchid Cellmark DNA laboratory tested the same evidence examined by the Wisconsin Crime Laboratory in 1981 and found that the victim's sexual assault specimens contained male DNA. A DNA analyst also confirmed that two decades earlier the Wisconsin Crime Lab found positive sexual assault findings consisting of 1) the presence of acid phosphatase, a substance known to be present in male seminal fluid, and 2) the abnormal presence of crystals and multiple blood types in the victim's rectal sexual assault specimen. The Wisconsin Crime Lab listed the victim on a sexual assault/homicide list.

Unaware of the hidden Wisconsin Crime Laboratory positive sexual assault results, the Associate Medical Examiner answered "no" when asked whether she found any evidence of recent sexual intercourse during the autopsy. After receiving the

new DNA confirmation of male DNA and the hidden sexual assault crime lab documents, the Associate Medical Examiner now classifies this murder as a "sexual assault/homicide" committed by a "male."

The new evidence corroborates the eye witness identification and initial police description of the murderer as a ***heavyset white male***, a gender classification that excludes Ms. Bembenek. Had the jury known of the exculpatory sexual assault evidence, the eye witness testimony that the murderer was a male, "not Laurie," would have been rendered believable and less weight would have been given to the false ballistics results.

**Other Circumstantial Evidence Now Discredited**

The State's other circumstantial trial evidence consisting of a reddish brown wig, blonde hairs on a bandana used to gag the victim, a green jogging suit and rope, and an alleged motive for the murder (alimony payments being made by Ms. Bembenek's husband) were inconsequential without the ballistics match. This other circumstantial evidence has also been discounted. A key trial witness admitted that her testimony was coerced by Milwaukee Police officers who threatened to charge her with a crime.

**The Wig**

Since the murderer was identified as a heavyset man with long dark hair pulled into a ponytail, the prosecution needed the wig to link Bembenek to the murder. The prosecution introduced the testimony of a crime lab analyst to confirm that a fiber found on the body of the deceased was consistent with fibers from a wig found weeks after the murder clogging a jointly shared bathroom pipe in Bembenek's apartment building. The prosecution argued that Ms. Bembenek wore the wig at the time of the murder and discarded this evidence by flushing it down the toilet.

This wig evidence has now been discredited. The resident of the adjoining apartment confirmed that the last person to use the bathroom before it clogged was the State's key witness, ***not*** Ms. Bembenek. This clearly exculpatory information as to who last used the bathroom before it clogged had been disclosed to the prosecution. Like other exculpatory evidence this information was ***not*** disclosed to Ms. Bembenek and her trial attorney.

**The Green Jogging Suit & Rope**

Prosecutors presented testimony that Ms. Bembenek had a green jogging suit (like that worn by the murderer) and clothesline rope similar to the rope used to bind the victim. The witness establishing this link has now admitted that she never saw Ms. Bembenek in a green jogging suit and her trial testimony

regarding the rope being similar was the result of coaching by police and the prosecution.

The green jogging suit testimony was necessary as two police officers were sent to the Bembenek/ Schultz apartment shortly after the murder. Awakened from her sleep, Ms. Bembenek allowed the officers to search the entire apartment but no green jogging suit was found.

**Blonde Hairs on the Bandana Gag**

Blonde hairs were also used to connect Ms. Bembenek to the crime scene. A Wisconsin Crime lab analyst testified that blonde hair found on the victim's bandana gag were "consistent" with Ms. Bembenek's hair. This blonde hair connection was introduced at Bembenek's trial based upon a ***false evidentiary stipulation*** that the blonde hairs present on the bandana gag were found by the Associate Medical Examiner at the time of the autopsy. The Associate Medical Examiner, sequestered as a witness during the trial, was unaware of the stipulation. After learning of the false stipulation, Associate Medical Examiner Dr. Samuels notified authorities that she did ***not*** obtain any blonde or reddish hairs from the body during the autopsy and urged authorities to investigate the mysterious appearance of blonde hairs in the envelope she had sealed.

### C. Newly Discovered Evidence Proves "Actual Innocence"

Ms. Bembenek has now proven "actual innocence." The totality of the new evidence eliminates the murder weapon, corroborates the eyewitness description of the murderer as a ***heavyset male, not Ms. Bembenek,*** and destroys the circumstantial case used for conviction. **The totality of the evidence now known is staggering: no wig, no blonde hairs, no green jogging suit, no rope, no murder weapon, and male DNA in the sexual assault specimens resulting in the classification of this murder as a sexual assault/homicide.**

Despite this newly found evidence of innocence beyond any reasonable doubt, Ms. Bembenek stands convicted of a crime she did not commit with no available remedy because of a no contest plea. This Wisconsin decision penalizes Bembenek and allows a constitutionally infirm no contest plea to trump new evidence of actual innocence. This case presents the United States Supreme Court with a unique opportunity to address and clarify the proof required for "actual innocence" claims and the remedies available once proof of actual innocence is established.

## II. This Court Should Grant Certiorari To Provide Standards for Plea Defendants with Proof of Innocence and Constitutional Violations

This Wisconsin decision leaves Ms. Bembenek with no remedy despite compelling new evidence of innocence and constitutional violations. Despite the constitutional right to due process and a fair trial embodied in the Fifth and Fourteenth Amendments to the Constitution, the State withheld significant exculpatory evidence and then destroyed the false evidence used as the basis for conviction. These violations rendered the plea constitutionally infirm and so impaired Ms. Bembenek's constitutional rights that they alone warrant reversal of her conviction.

### A. Constitutional Violations as Federal Question Cognizable for Review

The Bembenek case is appropriate for review because a federal question was presented to the state court and the state ground on which the case was decided was not sufficient to sustain the decision. In *Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956), the United States Supreme Court succinctly summarized its jurisdiction to review a state court decision:

> It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State

> having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. *But it is likewise well settled that if the independent state ground was not a substantial or sufficient one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.*

351 U.S. at 281-282 (internal modifications, quotations and citations omitted).

The Wisconsin Court decision lacks sufficient state ground to sustain its decision and allowed a plea obtained with false evidence and tarnished by constitutional violations to trump evidence of innocence. The Wisconsin decision raises a federal question and allows this Court to take jurisdiction.

### B. Bembenek's Constitutionally Infirm No Contest Plea

With a broad sweep of its pen, the Wisconsin Court forever barred Bembenek's right to relief based on a constitutionally infirm no contest plea. In rendering this flawed decision, the court failed to address the egregious constitutional violations present at the time of the plea and their effect on the no contest

plea. A dissenting justice to the Bembenek decision noted the dilemma stating that the Wisconsin Supreme Court has not set out a rule of law that is applicable to a defendant's waiver of appeal rights as part of a plea bargain and no case has decided whether a plea waives the right to DNA testing. [App. 26-28]

The United States Supreme Court has repeatedly stated that for a plea to function as a valid waiver of constitutional rights, the plea must be an intentional relinquishment of known rights. *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Ms. Bembenek's plea was not a relinquishment of known rights. When offering the plea, the State withheld exculpatory ballistics and sexual assault evidence, proffered a false ballistics match as the basis for the plea, and failed to disclose that critical ballistics evidence had been secretly destroyed. That non disclosure alone rendered this plea invalid. Had the State disclosed the true state of the evidence, the trial court could not have authorized the plea. By law, the Wisconsin trial court was obligated to undertake an inquiry that satisfied it that the "defendant in fact committed the crime charged. . . ." Sec. 971.08(1)(b) Wis. Stat. Had Ms. Bembenek known of the true state of the evidence she would have refused the plea

bargain as there was no evidence to support the murder charge and zero probability of conviction.

While an effective waiver "extinguishes the error and precludes appellate review," *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000), a waiver of the right does not completely foreclose review. *Jones v. United States,* 167 F.3d 1142, 1144 (7th Cir. 1999). A defendant does *not* lose the right to pursue a claim that the waiver was involuntarily made, was based on a constitutionally impermissible factor, or was made without the effective assistance of counsel. *Id.* at 1144-45, emphasis added.

For a plea to be valid, a defendant must have a full understanding of the charges against him. *Brady v. United States*, 397 U.S. 742, 748 n.6, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). A plea is not voluntary unless the defendant understands the nature of the constitutional rights he is waiving and is given full disclosure of the factual basis for the charge at the time of the plea. To ensure a knowing, intelligent, and voluntary plea, courts are obligated to explore the defendant's capacity to make informed decisions. If the plea was involuntary, then the waiver falls because it is part of the whole package. *See United States v. Wenger*, 58 F.3d 280 (7th Cir. 1995).

Bembenek's no contest plea failed to meet the mandates for a valid plea. The violations of Bembenek's constitutional rights at the time of the plea rendered it invalid. *See Brady v. United States,* 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970);

*Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995) (defendant challenging the voluntariness of his guilty plea could assert a *Brady* claim). Despite Bembenek's multiple written requests for all exculpatory evidence, the State withheld evidence that it was duty bound to disclose. The egregious nature of these violations should have been considered by the Wisconsin Court and independently require reversal of Bembenek's conviction. Additionally, at the time of Bembenek's plea DNA testing was not available and consequently it was not discussed. The Supreme Court has not yet considered the validity of a plea waiver to unknown scientific testing such as DNA that becomes available after a plea. In light of rapidly developing scientific avenues for proving innocence, the need for Supreme Court review is timely.

### C. The Conflict of Law on *Brady* Violations and Guilty Pleas

The State's duty to disclose and preserve evidence in accordance with the Due Process clause has its origins in *Brady v. Maryland,* 373 U.S. 83, 87 (1963). In *Brady* the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87-88 (1963); *see also, United States v. Agurs,* 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976), holding that the prosecution has the duty to volunteer any

exculpatory evidence that creates a reasonable doubt about guilt, but does not have a duty to allow complete discovery of the prosecution's files as a matter of routine practice.

The focus of *Brady*, however, was on a defendant's right to a fair trial. The United States Supreme Court has not decided whether the duty to disclose exculpatory evidence extends to cases in which a defendant ultimately pleads guilty, or whether a guilty plea waives any challenge on that basis. *Cf. United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (holding that there is no constitutional duty to disclose impeachment material before a guilty plea, but not addressing whether due process requires disclosure of material evidence of factual innocence); *see McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (reasoning that "*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence" that makes it "*highly likely the Supreme Court would find a violation of the Due Process Clause if prosecutors . . . have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.*" However, the Court of Appeals did not resolve this question) (emphasis added); *United States v. McCleary*, 112 F.3d 511 (4th Cir. 1997) (unpublished) ("The Supreme Court has never applied *Brady*, or its progeny, to a guilty plea.").

Significantly, in the years since the Court decided *Brady*, six federal appellate courts have held that the

prosecutorial duty to disclose material exculpatory evidence to a criminal defendant exists not only prior to a trial, but also before entry of a guilty plea. *See Ferrara v. United States,* 456 F.3d 278 (1st Cir. 2006) (court determined that inmate was entitled to habeas relief because government's failure to produce exculpatory evidence rendered the guilty plea constitutionally infirm, and government's nondisclosure constituted impermissible prosecutorial misconduct sufficient to support inmate's claim that his guilty plea was involuntary under the Due Process Clause); *McCann v. Mangialardi,* 337 F.3d 782 (7th Cir. 2003); *United States v. Avellino*, 136 F.3d 249, 254-62 (2d Cir. 1998); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994); *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988); *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988). The Sixth Circuit has also addressed the issue, but its holding was not clear. *See Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985). That Circuit seems to lean towards recognizing a *Brady* claim after a guilty plea as evinced by remarks such as "the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent." *Id.*, 769 F.2d at 321.

In contrast, the United States Court of Appeals for the Fifth Circuit has stated that the prosecutor's disclosure obligations under the *Brady* doctrine do

not apply in connection with a guilty plea. *See Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000). In *Matthew*, the court held that under the nonretroactivity rule from *Teague v. Lane*, 489 U.S. 288 (1989), it was prohibited from addressing Matthew's *Brady* claim because " . . . in order to hold that the prosecutor's failure to disclose exculpatory information prior to entry of a guilty plea is a *Brady* violation, would require adoption of a new rule. . . ." *Matthew*, 201 F.3d at 362. However, the court also commented that, in its view, *Brady* is a trial right, defined in terms of the effect on the judge or jury of nondisclosure of exculpatory information; a defendant who has waived his right to trial does not risk conviction by a judge or jury kept ignorant of exculpatory evidence. *Id.*

Significantly, in our judicial system in which the vast majority of cases are resolved through plea bargains, the Supreme Court has addressed only one post-guilty plea *Brady* challenge and in doing so failed to resolve the split of authority created by the Fifth Circuit. *See United States v. Ruiz*, *supra*. In view of the large number of criminal cases disposed of each year by plea bargains and the continuing split among the circuits over whether the *Brady* doctrine applies in this context, this Court's review is now warranted.

### D. Evidence Fabrication and Destruction Constitutional Claims Mandating Reversal

Despite new proof of evidence fabrication and destruction, the Wisconsin Court failed to address the impact of these constitutional violations on Bembenek's no contest plea. Prior United States Supreme Court cases have recognized that "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois,* 360 U.S. 264, 269 (1959) (citing *Mooney v. Holohan,* 294 U.S. 103 (1935)).

Proof of fabrication requires that a conviction be set aside unless the error was truly harmless. *United States v. Agurs,* 427 U.S. 97, 103 (1976). This is an even more exacting standard than applies when State officials deliberately withhold exculpatory information from the defense. *See, e.g. United States v. Bagley,* 473 U.S. 677, 682 (1985) (holding reversal warranted where there exists a "reasonable probability" that the jury's verdict "would have been different)."

While both standards require misconduct on the part of State actors, this Court has noted that there is something particularly offensive about allowing convictions predicated on false evidence to stand uncorrected. That mandate applies to all defendants and does not exclude no contest and guilty plea defendants. The Seventh Circuit has commented that

"it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such evidence to a defendant before he enters into a guilty plea." *McCann v. Mangialardi,* 337 F.3d 782, 788 (7th Cir. 2003).

Bembenek's no contest plea was permeated with constitutional violations including the State's destruction of evidence. The United States Supreme Court has addressed the issue of preservation of evidence in two cases, *California v. Trombetta,* 467 U.S. 479 (1984) and *Arizona v. Youngblood,* 488 U.S. 51 (1988). In each case, the Supreme Court formulated a test to determine whether the pre-trial destruction of evidence violated a criminal defendant's due process rights. *Youngblood,* 488 U.S. at 56-58; *Trombetta,* 467 U.S. at 488-90. If a criminal defendant can satisfy either test, a court will declare the destruction a violation of due process and reverse the defendant's conviction. *Youngblood,* 488 U.S. at 54; *Trombetta*, 467 U.S. at 484.

In view of the egregious constitutional violations present at the time of Bembenek's plea, this Court should grant certiorari to address the remedies available to no contest and guilty plea defendants when post plea evidence of constitutional violations are uncovered.

## III. This Court Should Grant Certiorari To Provide Uniform Post Conviction DNA Guidelines

It is widely acknowledged that in the criminal justice system today, the status of post conviction DNA testing is a matter of some contest. *See* Seth Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence & Post Conviction Testing,* 151 U. Pa. L. Rev. 547 (December 2002). DNA exonerations have disclosed deliberate (and in some cases criminal) police and prosecutorial misconduct in obtaining the tainted convictions. *Id.* at 562 n.57. Prosecutors have sought to narrowly constrain the availability of post conviction testing citing financial concerns, the need for finality in the criminal justice system, the need to protect the system of plea bargaining, and the fear of a wave of frivolous requests. *Id.* at 561, n.49-52. This anti-DNA position conflicts with a deeply rooted constitutional right that "no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 565 citing *Wolf v. McDonnell,* 418 U.S. 539, 579 n.64 (1974).

### A. The Jurisdictional Disparity in Post Plea DNA Availability

Numerous states have addressed the issue of post conviction availability of genetic samples and testing through so-called "innocence" statutes. Dozens of states have enacted such statutes to allow post conviction access to DNA and other scientific testing.

Most of these modern innocence statutes allow successful results of DNA testing to be used as grounds for filing post conviction relief motions for those specific defendants covered by the statute. *See* D. Bortech, *Pleas for DNA Testing: "Why Lawmakers Should Amend Post Conviction DNA Testing to Apply to Prisoners Who Plead Guilty,"* 25 Cardozo Law Review 1429 n.4 (2004).

### B. Variances in DNA Remedies for No-Contest and Guilty Plea Defendants

The availability of a DNA remedy, however, varies from state to state for defendants who have pled no contest, nolo contendere, or guilty. Whether a remedy is available depends primarily on the terms of the particular "innocence statute" under which relief is sought. Innocence statutes that include an identity at issue requirement exclude those who have pled guilty. Statutes that use the word "trial" in their identity at issue requirement automatically exclude plea bargains. *Id.* at 1464. Almost one-half of the statutes with post conviction DNA testing statutes include some form of identity at issue requirement, thereby excluding coverage. *Id.* at 1458, n.190.

The varying DNA statutes cause a confusing array of results throughout the United States. Justice for post plea defendants depends on the place of conviction. States like Texas and Ohio, for example, provide coverage for plea defendants. The Texas Court of Appeals held that a defendant convicted of

murder pursuant to a plea agreement had the right to appeal the trial court's denial of defendant's post conviction motion for DNA testing as the Texas statute does not exclude guilty or nolo contendere cases. *Rodriguez v. State*, 153 S.W.3d 245 (Tex. App. 2004), *see also*, Tex. Crim. Proc. Code Ann. art. 64.03(b). Similarly, the Ohio court held that it was error for a trial court to deny an inmate's application for post conviction DNA testing based on the inmate's guilty plea. *State v. Rossiter*, 2004 Ohio 4727, 2004 Ohio App. LEXIS 4287 (Ohio App., Sept. 8, 2004).

By contrast, Illinois and New York exclude DNA testing access for plea defendants. The Illinois Supreme Court recently held that that because the Illinois statute permitted a post-trial motion for DNA testing *only* when a defendant was convicted following a trial in which identity was contested, a defendant who had pled guilty could not avail himself of this statute. *People v. O'Connell*, 227 Ill. 2d 31, 879 N.E.2d 315 (2007). Likewise, the New York Supreme Court, Appellate Division, held that a defendant who pled guilty was not entitled to post conviction DNA testing because the applicable statute makes conviction by verdict and judgment after trial an explicit requirement for relief. *People v. Byrdsong*, 33 A.D.3d 175, 820 N.Y.S.2d 296 (2006).

In one reported case, a defendant sought statutory (non-habeas) post conviction DNA testing to prove his innocence *after* he completed his sentence, *People v. Schutz*, 344 Ill. App. 3d 87, 799 N.E.2d 930 (2003). The defendant in *Schutz* was convicted by a

jury of murder and released from prison after serving 14 years of his sentence. Although the court affirmed the dismissal of the defendant's petition due to failure of proof, it held that the statute by its plain terms did *not* require that a defendant still be incarcerated in order to seek DNA testing under the statute. *Id.* at 91.

Wisconsin's DNA statute provided Bembenek with post plea access to DNA evidence and authorized Wisconsin courts to enter any order "that serves the interest of justice," including vacating the sentence, ordering a new trial or fact-finding hearing, resentencing, or freeing the defendant from custody. Wis. Stat. Ann. § 974.07(a)(10). Wisconsin's DNA Statute does not require that a defendant still be incarcerated in order to obtain a remedy and by its terms does *not* preclude relief to a defendant merely because his conviction was based on a no contest or guilty plea. Rather, the plain language of § 974.07 (which the *Bembenek* State Court ignored in its decision) broadly allows a motion to be brought by a movant "[a]t *any* time after being *convicted of a crime*. . . ." Wis. Stat. § 974.07(2), emphasis added.

The Wisconsin decision eviscerated Wisconsin's statutory goal of justice for all by denying relief to Bembenek. That published decision now applies to all other similarly situated Wisconsin no contest and guilty plea defendants. As a result, Wisconsin joined the long list of states that arbitrarily refuse access to DNA remedies by post plea defendants.

### C. Bembenek's No Contest Plea versus New Evidence Dilemma

The Wisconsin Court's dismissal on the sole basis of the 1992 no contest plea is troubling given the State's explicit DNA court agreement granting Bembenek post plea DNA and ballistics testing. Faced with proof of actual innocence and constitutional violations from that testing, the State breached the DNA agreement and on appeal argued that Ms. Bembenek's no contest plea barred the appeal.

The Wisconsin Court's reliance upon the 1992 no contest plea as a basis for dismissal flies in the face of the State's 2002 DNA trial court agreement with Bembenek. The general legal rule is that a party waives a claim that is not raised in the trial court and will not be considered on appeal. *Stern v. Credit Bureau of Milwaukee,* 105 Wis. 2d 647, 654-55, 315 N.W.2d 511, 515-16 (Ct. App. 1981). The State's actions in the DNA trial court modified Bembenek's no contest plea by allowing post plea DNA testing "as long as she paid for it." The subsequent conduct of the parties clearly evinced the intent to amend the scope of the plea. *See Dairyland Greyhound Park v. Doyle,* 2006 WI 107, ¶ 18 citing *Management Computer Servs Inc. v. Hawkings, Ash, Baptie & Co.*, 206 Wis. 2d 158, 179-180, 557 N.W.2d 67 (1996).

Relying on the post plea DNA agreement which held out the promise of a remedy if innocence was established, Ms. Bembenek incurred $40,000 of testing expenses. While attempting to earn the

testing money, she suffered a tragic accident that resulted in the amputation of a limb. Ms. Bembenek fulfilled her part of the bargain and paid a high price for nothing. Despite newly found DNA and ballistics evidence of innocence beyond any reasonable doubt, Ms. Bembenek stands convicted of a crime she did not commit with no remedy available.

The Wisconsin decision violates constitutional law and allows a constitutionally infirm no contest plea to trump new evidence of innocence. In his State of the Union Address, President Bush committed our great nation to addressing the need for equal justice stating "In America, we must make doubly sure no person is held to account for a crime he or she did not commit." *See* Peter Baker, *Behind Bush's Bid to Save the Innocent,* Washington Post A09 (Feb. 4, 2005). Given the disparity in access to DNA remedies, this case presents the United States Supreme Court with a unique opportunity to correct a manifest injustice and ensure that all citizens have equal access to justice.

## CONCLUSION

An inscription over the doors of the United States Department of Justice states, "The United States wins its point whenever justice is done to its citizens in the courts." Ms. Bembenek has spent her entire adult life under the cloud of a wrongful murder conviction garnered through a false ballistics match, bolstered by the State's failure to disclose exculpatory evidence, and sabotaged by the State's destruction of evidence and breach of the DNA court agreement. Despite compelling new evidence of actual innocence and constitutional violations, Ms. Bembenek has been denied a remedy. Seeking justice for herself and all other similarly situated no contest and guilty plea defendants, Ms. Bembenek now petitions the United States Supreme Court for relief.

Respectfully submitted,

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**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 06, 2006**

Cornelia G. Clark
Clerk of Court of Appeals

**Appeal No.**
**2004AP1963-CR**

**STATE OF WISCONSIN**

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. No. 1981CF775

**IN COURT**
**OF APPEALS**
**DISTRICT I**

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STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAWRENCIA ANN BEMBENEK,

DEFENDANT-APPELLANT.

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APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, Kessler and Anderson, JJ.

¶1 KESSLER, J. Lawrencia A. Bembenek appeals from an order denying her motion requesting

that the State pay for postconviction deoxyribonucleic acid ("DNA") testing of items in the State's possession which Bembenek "believes will exonerate her."

¶2 On December 9, 1992, Bembenek entered into a plea agreement wherein she agreed to plead no contest to the charge of second-degree murder of Christine Schultz in exchange for the vacating of her conviction of the first-degree murder of Schultz, a sentence recommendation by the State of twenty years, credit for all time served,[1] and a waiver of any and all of her appeal rights or rights to collaterally attack any of the underlying evidence, including her right to assert any claim of innocence to the murder.[2]

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[1] This sentence recommendation was effectively one of "time already served" and, therefore, the trial court's imposition of the twenty-year sentence had the effect of releasing Bembenek from prison immediately, with the remainder of the twenty years served as parole.

[2] This agreement, as set out at the December 9, 1992 hearing, is as follows:

> [DEPUTY DISTRICT ATTORNEY]: The State of Wisconsin and defendant Lawrencia Bembenek, through her attorney Sheldon Zenner, have reached an agreement which we present to the Court to resolve this matter. . . . The resolution is that Lawrencia Bembenek's 1982 conviction for first degree murder be vacated, with the understanding that she will enter a plea of no contest to a charge of second degree murder, contrary to Wisconsin Statutes sec. 940.02(1) as it existed back then. . . .
>
> Further, as part of the agreement, Lawrencia Bembenek agrees to waive certain appellate rights. Those rights consist of any agreement to withdraw a

(Continued on following page)

On April 14, 2002, Bembenek was released from parole, her sentence fully completed. Because we conclude that Bembenek's action in bringing the underlying motion and this appeal[3] is a breach of her

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plea based on a claim of innocence, any challenges to the underlying factual basis for the plea, any type of direct or collateral appeal, any type of challenge to the sentencing, and any type of challenge to any waiver of the rights involved in the entry of a plea.

Finally, each side is free to argue to the Court for any disposition that it believes to be appropriate based upon all the facts and circumstances.

* * *

[THE COURT]: In terms of the outline of the agreements between the parties, then it is my understanding that by the stipulation of the parties you are asking the court to vacate the judgment of conviction. The State would then file an amended information. Your client is prepared to enter a plea of no contest to that Amended Information. Each side would be free to argue for any disposition they thought appropriate within the terms of the maximum sentence that could be imposed at that time under the statute, 20 years for a Class B felony at that time. And further it's my understanding that your client is agreeing to waive appellate rights as described by Mr. Donohoo in his statement.

[COUNSEL FOR BEMBENEK]: That is all correct.

[DEPUTY DISTRICT ATTORNEY]: That is correct.

[3] In her notice of appeal, Bembenek appealed "from the whole of the Final Orders entered on June 15, 2004, including all prior proceedings, decisions, and rulings relative to post conviction proceedings commencing on and since August 23, 2002 in Case No. K0775."

plea agreement, and the appropriate remedy for this breach is the dismissal of her appeal, we affirm.

## BACKGROUND

¶3 We briefly summarize the lengthy saga of Bembenek's litigation in Wisconsin courts to put this appeal in context. In 1981, Schultz was found shot to death in the bedroom of her home. In 1982, Bembenek was convicted by a jury of first-degree intentional homicide in the death of Schultz and sentenced to life in prison. On direct appeal from that conviction, the court of appeals affirmed the conviction, rejecting all nine issues raised by Bembenek. In 1985, Bembenek filed a motion for a new trial alleging newly discovered evidence. That motion was denied. In 1987, Bembenek filed a motion for post-conviction relief alleging ineffective assistance of counsel. The trial court denied relief. In 1990, the court of appeals affirmed. Bembenek then filed a petition for review with the Wisconsin Supreme Court which the court dismissed due to Bembenek's escape from prison and her fugitive status.[4]

¶4 In 1991, a John Doe proceeding was convened to investigate charges of mismanagement and improprieties in the investigation and prosecution of

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[4] Bembenek escaped from Taycheedah Correctional Institution in July 1990. She was recaptured in Thunder Bay, Ontario, Canada in October 1990 and eventually returned to custody in Wisconsin.

the murder of Christine Schultz by the Milwaukee Police Department and the Milwaukee County District Attorney's Office. In August 1992, the John Doe judge found that while significant mistakes were made in the investigation of Schultz's murder, there was no probable cause to believe that these mistakes were intentional. The John Doe judge further found that there was no probable cause to believe that:

> (1) "perjury was encourage [sic] or procured or that there was any other criminal wrongdoing on the part of law enforcement personnel . . . " or that
>
> (2) "the Milwaukee County District Attorney's Office knowingly used false testimony, intentionally or otherwise, failed to disclose exculpatory evidence to the defense, or engaged in any other impropriety in the prosecution of Lawrencia Bembenek . . . [including] no probable cause to believe that any law enforcement agency or personnel engaged in a conspiracy to frame Lawrencia Bembenek."

¶5 In 1992, Bembenek filed a motion for a new trial again alleging newly discovered evidence. Before this motion was decided, Bembenek and the State reached an agreement wherein Bembenek would plead no contest to second-degree intentional homicide in exchange for a reduction of the charge for which she had been convicted, a sentencing recommendation effectively to time served, and her waiver of a number of rights, including all future appeals or collateral attacks on her conviction. On December 9,

1992, at the hearing originally set on Bembenek's motion for new trial or to vacate judgment, the parties informed the trial court that a plea agreement had been reached "that obviated the need for the court to decide that motion." The plea agreement provided that Bembenek's "first-degree murder conviction would be vacated and that she would enter a no contest plea to a charge of second-degree murder."

¶6 The trial court, in its plea colloquy, specifically confirmed that Bembenek understood that she was:

- "waiving her right to litigate any defenses, including the defense of actual innocence";
- waiving her "right of direct appeal, the right of some collateral attack on the judgment, the right to bring motions to withdraw this plea at some point in the future"; and
- waiving "*any challenges that might be brought to the underlying factual basis for this plea.*" (Emphasis added.)

Additionally, as expressly noted on the No Contest Plea Questionnaire and Waiver of Rights Form, Bembenek specifically waived the "right to challenge matters set forth in motions, such as the arrest, suppression of physical evidence, suppression of identification, [or] challenges to the sufficiency of the complaint and/or information."

¶7 Bembenek acknowledged, on the record, in response to questioning by the trial court, that she understood each specific constitutional right identified in the No Contest Plea Questionnaire, and that she was waiving those rights with her plea of no contest. Bembenek's counsel specifically noted, when arguing for a sentence to time already served, that giving such a sentence "will certainly help Miss Bembenek get started back on the track toward getting her life in order and beginning a new life. . . . I can tell you that her foremost interest is to put this entire matter behind her once and forever."

¶8 On August 23, 2002, after fully completing her sentence, and twenty years after her original conviction, Bembenek filed a Motion for Release of Evidence for DNA Testing Pursuant to WIS. STAT. § 974.07.[5] The State and Bembenek thereafter stipulated to the release of fourteen items to be tested. On December 16, 2002, Bembenek then filed a Motion for Ballistic Testing, requesting further ballistic testing of the gun determined by the jury to be the murder weapon. The State subsequently agreed to have this testing done. In 2003, Bembenek moved the trial court to vacate the judgment of conviction and for an entry of a judgment of acquittal.

¶9 The trial court denied all of Bembenek's pending motions, concluding that the results of the

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[5] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DNA testing were insufficient to find that "there is a reasonable probability [Bembenek] would not have been convicted for the Christine Schultz homicide if this evidence had been available before her trial" and further ruling that the related ballistic testing requested was therefore unnecessary. Bembenek appealed.

## DISCUSSION

¶10 A review of the record in this case convinces us that we must affirm this dismissal on a basis other than the one relied upon by the trial court. ***Kafka v. Pope,*** 186 Wis. 2d 472, 476, 521 N.W.2d 174 (Ct. App. 1994) (acknowledging that the court of appeals "can affirm for reasons not stated by the trial court even if the reasons were not argued before the trial court"); *see also* ***Liberty Trucking Co. v. DILHR,*** 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973) (holding that when an appellate court affirms on other grounds, it need not discuss the trial court's chosen grounds of reliance).

## EFFECT OF THE PLEA AGREEMENT

¶11 Plea bargaining has been recognized as an "essential component of the administration of justice." ***Santobello v. New York,*** 404 U.S. 257, 260 (1971); *see also* ***State ex rel. White v. Gray,*** 57 Wis. 2d 17, 21, 203 N.W.2d 638 (1973) ("Plea bargaining is an accepted and necessary part of the process whereby a good many criminal prosecutions are terminated as a

result of a guilty plea."). Because a plea bargain is analogous to a contract, we look to contract-law principles to determine a defendant's rights thereunder. ***State v. Windom***, 169 Wis. 2d 341, 348, 485 N.W.2d 832 (Ct. App. 1992); ***State v. Jorgensen***, 137 Wis. 2d 163, 167, 404 N.W.2d 66 (Ct. App. 1987). "A contract is based on a mutual meeting of the minds as to terms, manifested by mutual assent." ***Goossen v. Estate of Standaert***, 189 Wis. 2d 237, 246, 525 N.W.2d 314 (Ct. App. 1994); *see also* ***State v. Bowers***, 2005 WI App 72, ¶26, 280 Wis. 2d 534, 696 N.W.2d 255 (Brown, J. dissenting) (noting that one "major tenet" of contract law is the mutuality of assent; accordingly, "[i]n plea bargaining terms, there must be a promissory exchange and the promise of certain benefits, including the exact penal promises, in return for a defendant's promise to enter a guilty or no contest plea.").

¶12 Bembenek and the State reached a mutual assent to the terms, and benefits, of their plea agreement, an agreement into which Bembenek entered knowingly, voluntarily and intelligently. In exchange for having her conviction for first-degree murder vacated (thus eliminating a mandatory life sentence) and obtaining a new sentence which would allow her to be released from prison immediately, Bembenek agreed to plead no contest to second-degree murder and to waive a number of rights, including any right to bring a "collateral attack on the judgment . . . [or] any challenges that might be brought to the underlying factual basis for this plea." Bembenek's

agreement is reflected in the record. When specifically asked by the trial court, "Do you have any questions about any of the rights that we've discussed here today?" Bembenek answered, "No questions." And when asked if she understood these rights were being given up, she answered "Yes, I understand." In response to the trial court's inquiry as to whether any other promise had been made to Bembenek to induce her into pleading no contest or whether she was forced or threatened in any way to induce her into entering into the plea agreement, Bembenek answered "No." Finally, when asked by the trial court if "this is a decision that you have come to freely and voluntarily?", Bembenek answered, "Yes, I have." At all times in this proceeding, Bembenek was represented and assisted by counsel. Bembenek has not claimed that her plea was not knowing and voluntary and the record reflects an intelligent, knowing and voluntary plea by Bembenek.

¶13 The trial court asked the State its reasoning for moving to vacate the original first-degree murder conviction and for agreeing to the lesser charge of second-degree murder. The State explained that while the "State of Wisconsin remains convinced that Lawrencia Bembenek is guilty of the slaying of Christine Schultz on May 28, 1981," a conviction of second-degree murder was consistent with the evidence and the State's theories of the case at the original trial. The State further noted that should the trial court grant Bembenek's motion for a new trial, there are many difficulties inherent in re-trying a

case over a decade after the first trial and a resolution through this plea agreement furthers the interests of justice.

¶14 In accepting the reduced charge and plea, the trial court observed:

> The third reason why I believe this negotiation furthers the interests of justice in this case is finality. The no contest plea in this case and waiver of appellate rights will put an end to the legal battles fought between the State of Wisconsin and the defendant in this court system over the past 10 years. Finality in the criminal justice system is a principle too often lost and ignored. Endless post-conviction litigation in criminal cases too often serves no legitimate purpose in furthering the interests of the community or a defendant.

¶15 The record demonstrates that an exchange of promises in return for specific benefits occurred: (1) Bembenek would no longer be convicted of first-degree murder; (2) Bembenek would be eligible, under her new sentence for second-degree murder, for immediate release from prison to parole; (3) the State would no longer need to devote significant resources to Bembenek's numerous collateral attacks on her convictions; and (4) Bembenek had been punished proportionately to the crime for which she was now convicted. Additionally, the plea agreement provided a final disposition in the murder case of Schultz for both parties and the community at large. There was a

mutuality of assent to the terms of the plea agreement which was respected by Bembenek for ten years, until 2002, when she filed her motion for DNA testing and acquittal.

¶16 Bembenek's no contest plea is equivalent to a guilty plea. "The general rule is that a guilty, no contest, or ***Alford***[6] plea 'waives all nonjurisdictional defects, including constitutional claims[.]'" ***State v. Kelty***, 2006 WI 101, ¶18, {blank} Wis. 2d {blank}, 716 N.W.2d 886 (citing ***State v. Multaler***, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437). This is known as the guilty-plea-waiver rule. ***Kelty***, 716 N.W.2d 886, ¶18.[7] Here Bembenek entered into a legally valid plea

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[6] ***North Carolina v. Alford***, 400 U.S. 25 (1970) (allowing a defendant to agree to accept conviction while simultaneously maintaining his or her innocence has become recognized as an ***Alford*** plea).

[7] Federal courts have addressed waiver in the context of pleas and plea agreements, and have enforced waiver of appellate rights. *See* ***U.S. v. Schmidt***, 47 F.3d 188 (7th Cir. 1995), holding:

> As a preliminary matter, we must address the question of the defendants' waivers of their right to appeal. Although the government has not relied on the defendants' waivers, we are not precluded from affirming on that basis. *See, e.g., United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991) (*per curiam*) (appellate court has the discretion to overlook the government's failure to argue harmless error). In deciding whether to determine the merits of the Schmidts' arguments or overlook the government's failure to argue waiver, one controlling consideration is whether the waivers were "certain or debatable." *Id.* Accordingly, we have focused our attention on the

(Continued on following page)

circumstances surrounding the Schmidts' execution of their plea agreements, each of which contained the waiver of the right to appeal.

Several of our sister circuits have held that a waiver of a right to appeal contained within a guilty plea is enforceable. *See United States v. Bushert,* 997 F.2d 1343, 1347-50 (11th Cir. 1993); *United States v. Melancon,* 972 F.2d 566, 567-68 (5th Cir. 1992); *United States v. Rivera,* 971 F.2d 876, 896 (2d Cir. 1992); *United States v. Rutan,* 956 F.2d 827, 829 (8th Cir. 1992); *United States v. Navarro-Botello,* 912 F.2d 318, 321-22 (9th Cir. 1990), *cert. denied,* 503 U.S. 942, 112 S. Ct. 1488, 117 L. Ed. 2d 629 (1992); *United States v. Wiggins,* 905 F.2d 51, 52-54 (4th Cir. 1990); *see also United States v. Hendrickson,* 22 F.3d 170, 174 (7th Cir. 1994) (finding no waiver of the right to appeal because such a waiver "must be express and unambiguous"); *Johnson v. United States,* 838 F.2d 201, 203-04 (7th Cir. 1988) (upholding waiver of right to appeal not contained in the plea agreement but in a separate pleading). These courts reasoned that it is well settled that a defendant may waive constitutional rights as part of a plea bargaining agreement. *Newton v. Rumery,* 480 U.S. 386, 393, 107 S. Ct. 1187, 1192, 94 L. Ed. 2d 405 (1987). Although the right to appeal is statutory and not constitutional, *Abney v. United States,* 431 U.S. 651, 656, 97 S. Ct. 2034, 2038, 52 L. Ed. 2d 651 (1977), the courts have upheld waiver of the statutory right to appeal. *E.g., Melancon,* 972 F.2d at 567-68.

The courts have, however, placed restrictions on the waiver of the right to appeal. Obviously a waiver will be upheld only if the record clearly demonstrates that the defendant knowingly and voluntarily entered into the plea agreement. *Id.* Additionally, despite a valid waiver of the right to appeal, a defendant could appeal his sentence if the trial court relied on a constitutionally impermissible factor such as race

(Continued on following page)

agreement. She entered into it knowingly, voluntarily and intelligently. *See* ***State v. Bangert,*** 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986) (holding that guilty and no contest pleas are constitutionally valid if entered knowingly, intelligently and voluntarily). She received substantial benefits from that agreement. In that plea agreement, Bembenek specifically waived her right to claim her innocence, and her right to collaterally attack any evidence which was underlying the conviction. Accordingly, Bembenek waived any right to DNA testing of that evidence or court action to pursue such tests.

¶17 By filing motions to reexamine the evidence in 2002, Bembenek breached her plea agreement. "A material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the non-breaching party." *State v. Deilke,* 2004 WI 104, ¶14, 274 Wis. 2d 595, 682 N.W.2d 945 (citations omitted). Collateral attacks on convictions may be substantial and material breaches

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or if the court sentenced the defendant above the statutory maximum. *United States v. Marin,* 961 F.2d 493, 496 (4th Cir. 1992) ("a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court. For example, a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race.").

***Id.*** at 190.

of a plea agreement. ***Id.***, ¶¶ 22-24 ("[C]ollateral attack . . . prevented the State from receiving all it bargained for when it dismissed multiple charges in exchange for one . . . conviction. . . . [A] party to a plea agreement cannot do an 'end run' around the plea agreement and . . . accomplish by indirect means what could not be done by direct means."). Bembenek's breach here is both material and substantial because she has caused the State to, again, spend its resources responding to Bembenek's seemingly unending efforts to overturn her now twenty-year-old conviction for the death of Schultz.

¶18 In evaluating the appropriate remedy for a material and substantial breach of a plea agreement by a defendant, "[a] court must examine all of the circumstances of a case to determine an appropriate remedy for that case, considering both the defendant's and State's interests." ***Id.***, ¶25 (citation omitted). "One remedy is to vacate the negotiated plea agreement and reinstate the original charges against the defendant." ***Id.*** Were we to order that remedy and reinstate the first murder conviction, it might well result in reincarceration of Bembenek to serve the remainder of her life sentence. We decline to impose so harsh a sanction in view of the State's concession in the plea agreement. Alternatively, if the State were required to re-try Bembenek twenty years after the crime was committed, it would likely be seriously disadvantaged in locating witnesses and producing evidence no longer retained.

¶19 In the ten years following her original first-degree murder conviction, Bembenek filed numerous collateral attacks on her conviction. The State, in an attempt to bring closure for all involved, agreed to enter into this plea agreement with Bembenek. For the State to now be required to continue to litigate with Bembenek, or perhaps to re-try a case more than twenty years after the fact, is exactly the result that the State sought to avoid by its plea agreement. The State is entitled to the benefit of that agreement, just as Bembenek has already enjoyed its benefits. Under the circumstances of this case, in light of the significant passage of time – over twenty years since Bembenek's original conviction and fourteen years since her plea agreement and no contest plea – we conclude that the most appropriate remedy for Bembenek's breach is dismissal of this appeal.

*By the Court.* – Order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 30 | MILWAUKEE COUNTY

LAURIE BEMBENEK,
Petitioner,

v. Case No. K-0775

STATE OF WISCONSIN,
Respondent.

**DECISION AND FINAL ORDER**

(Filed Jun. 15, 2004)

*Introduction*

The petitioner, Laurie Bembenek, has moved the court for an order that would require the state to pay for postconviction deoxyribonucleic acid (DNA) testing of items in the state's possession the petitioner believes will exonerate her. Bembenek was convicted for the 1981 homicide of Christine Schultz. The petitioner argues that Christine Schultz was the victim of a sexual assault homicide, which Bembenek – as a female – could not have committed. The petitioner contends that the existence of male DNA on a vaginal swab proves this theory. The state opposes the petitioner's motion, arguing that the existence of male DNA on the vaginal swab is the result of contamination by a male who handled the sample sometime over the last twenty years. The state also argues

that no scientific basis exists to conclude Christine Schultz was sexually assaulted.

As a preliminary matter, it must be noted that the petitioner also asks this court to remove the Milwaukee County District Attorney's Office from this case. The petitioner contends that it is improper for the District Attorney's office to represent the interest of the State because the District Attorney's office has a conflict of interest based on a related civil lawsuit.

"A court may disqualify counsel based upon an appearance of impropriety if the conduct is sufficiently aggravated . . . While the appearance of impropriety is not a basis for automatic disqualification, it is an element that the trial court may consider in making disqualification determinations." *State v. Retzlaff*, 171 Wis. 2d 99, 103 (Ct. App. 1992). Based on a review of the facts of this case, this court concludes that the petitioner has not sufficiently raised the existence of a conflict and/or appearance of impropriety to require disqualification of the Milwaukee County District Attorney's office. Accordingly, the petitioner's motion to disqualify the Milwaukee County District Attorney's office is DENIED.

*Factual Background*

A hearing was held to determine whether the evidence supported the petitioner's theory that Christine Schultz was the victim of a sexual assault homicide. At the hearing, William Watson, an expert

forensic scientist and director of the Orchid Cellmark laboratory, testified on behalf of the petitioner. He testified that his lab performed DNA testing on various samples of evidence related to this case, including a vaginal swab taken from the victim in 1981. Orchid Cellmark found male DNA on the swab. While Mr. Watson testified that Orchid Cellmark did not contaminate the samples it tested, he had no opinion as to whether the Wisconsin State Crime Lab or the Milwaukee County Medical Examiner's Office had contaminated the vaginal swab (item "P"), prior to its arrival at Orchid Cellmark. He admitted that contamination was possible.

Based on these facts, it was Mr. Watson opinion, to a reasonable degree of scientific certainty, that the male DNA found on the vaginal swab was "more consistent with sexual contact" between Schultz and a male than with contamination. Mr. Watson further opined that such sexual contact possibly occurred within four to five days of her murder. Mr. Watson, however, had no opinion on whether the sexual contact was consensual or nonconsensual, or when in fact the sexual contact occurred.

To rebut the opinion of Mr. Watson, the state called it own expert witness, Cecelia Crouse, as well as Diane Hanson. It was Ms. Crouse's opinion, to a reasonable degree of scientific certainty, that no opinion could be reached as to *how* or *when* male DNA got on the vaginal swab. Ms. Crouse based this opinion on the fact that there is no indication of sperm or male epithelial cells on the swab. The state's

next witness, Diane Hanson, analyzed the evidence contained in the sexual assault kit in 1981. Ms. Hanson testified that in 1981, unlike today, evidence in crime labs was handled with bare hands. She also testified that a male, with the initials T.W.B. did acid phosphatase ("AP") testing on the samples.

*Standard of Review*

In order to prevail on her motion, the petitioner must prove, by clear and convincing evidence, that it is reasonably probable she would not have been convicted at trial if the proposed DNA testing results had been available before trial. *See* WIS. STAT. § 974.07(7) (court shall order testing if it believes '[i]t is reasonably probable that the movant would not have been ... convicted ... if exculpatory [DNA] testing results had been available before the ... conviction.); *see also State v. Avery,* 213 Wis. 2d 228, 232 (1997) ("clear and convincing" standard applied to postconviction motions based on newly-discovered evidence). If the testing results support the petitioner's innocence, the court has the authority to "enter any order that serves the interests of justice." WIS. STAT. § 974.07(10).

*Findings of Fact & Conclusions of Law*

This court finds the testimony of both Ms. Crouse and Ms. Hanson to be credible. This testimony supports the conclusion that a male that worked at the Wisconsin State Crime Lab or the Milwaukee County

Medical Examiner's Officer could have contaminated the evidence. Mr. Watson admitted that contamination was possible.

This Court questions the credibility of Mr. Watson's opinion, based on the numerous assumptions he made in arriving in his opinion that the male DNA evidence was consistent with sexual contact but not consistent with contamination. Most notably, this Court questions how Mr. Watson could conclude the vaginal swab sample was not contaminated prior to its arrival at Orchid Cellmark because there was "no evidence" of contamination. Mr. Watson acknowledged that "DNA has changed a lot of procedures and protocols," and the procedures used in 1981 are not what they are today. When discussing the handling of other evidence, Mr. Watson agreed that contamination was possible if the examiner was not wearing gloves. Mr. Watson also assumed that "the samples were handled only by women." The assumptions that form the basis of Mr. Watson's opinion are troubling to the court.

Moreover, Mr. Watson stated that he was not able to identify the presence of seminal fluid in this case. This court finds it unreasonable that, while Mr. Watson could agree that it was "speculation" to conclude that someone contaminated the vaginal swab sample "unless someone comes forward" and admitted it, he refused to agree "likewise [it is] speculative to state the markers on the vaginal swab are as a result of sexual contact."

At the hearing, much was made of the fact that, in 1981, the State Crime Lab got a "weak positive" result on an acid phosphatase ("AP") test. The petitioner argues this is "presumptive proof" of sexual activity. However, the physical evidence in this case overwhelmingly outweighs whatever "presumptive" value this "AP" test provides to prove Christine Schultz was the victim of a sexual assault homicide. No bruising was found on the genital area of Christine Schultz's body, nor was any tearing or ripping present. Moreover, her panties were still on her body. The "weak positive" result does not create a reasonable probability that the petitioner would not have been convicted based on her sexual assault homicide theory.

Therefore, the evidence presented at the hearing, including the male DNA found on the vaginal swab, does not convince this court that there is a reasonable probability the petitioner would not have been convicted for the Christine Schultz homicide if this evidence had been available before her trial. Since the DNA evidence presented by the petitioner has not convinced this court that Christine Schultz was the victim of a sexual assault homicide, the related ballistics testing is now unnecessary. Additionally, since any opinion of a forensic expert would be based on the DNA evidence, there is no need for this court to hear such testimony.

*Conclusion*

Based on a review of the arguments of the parties, this court concludes that the petitioner has not met her burden of proving she would not have been convicted if the DNA evidence had been available prior to her trial. Accordingly, the petitioner's motion is DENIED.

Dated this 15th day of June, 2004, in Milwaukee, Wisconsin.

[SEAL]

/s/ [Illegible]
Honorable Jeffrey A. Conen
Milwaukee County
Circuit Court, Branch 30

[SEAL]

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January 22, 2008

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You are hereby notified that the Court has entered the following order:

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No. 2004AP1963-CR *State v. Bembenek* L.C.#1981CF775

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Lawrencia Ann Bembenek, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

PATIENCE DRAKE ROGGENSACK, J. (dissenting to the denial of the petition for review). In 1982, Lawrencia Bembenek was convicted of first-degree homicide for the 1981 death of Christine Schultz. In 1992, that conviction was vacated pursuant to a plea agreement in which Bembenek pled no contest to second-degree homicide. As part of her plea agreement, Bembenek waived the right to appeal or pursue postconviction relief.

At her 1982 trial, a ballistics expert testified that the test bullet had been fired from Elfred Schultz's off-duty revolver, and the expert said the bullet taken from Christine Schultz's body had been fired from that revolver as well. There also was testimony that Bembenek had access to Elfred Schultz's off-duty revolver. Subsequent to her 1992 plea, Bembenek learned that the test bullet used as evidence in her trial was missing. Following this discovery, Bembenek repeated the test of Elfred Schultz's off-duty revolver, and forensic experts have given affidavits to the effect that they could not identify the murder bullet as having been fired from the off-duty revolver. Bembenek also learned of male DNA present on swabs taken from Christine Schultz after her death.

With this new information in hand, Bembenek moved the court to order postconviction DNA testing pursuant to Wis. Stat. § 974.07. The circuit court denied her motion based on its determination that she had "not met her burden of proving she would not have been convicted if the DNA evidence had been available prior to her trial," as § 974.07(7) requires when the State pays for the testing. The circuit court did not address § 974.07(6), which does not require Bembenek to prove she would not have been convicted if the DNA evidence had been available prior to her trial, but is applicable when a defendant pays for the tests. Bembenek had withdrawn her request for State payment while her motion was pending in the circuit court. On appeal, the court of appeals did not address any aspect of § 974.07. Instead, it affirmed the circuit court's denial of Bembenek's motion based on her waiver of appeal rights in 1992. Bembenek petitioned for review.

I would grant the petition for two reasons: First, the Wisconsin Supreme Court has not set out a rule of law that is applicable to a defendant's waiver of appeal rights as part of a plea bargain. Under federal case law, the waiver of appeal rights is tied to the validity of the plea, such that if the plea is knowingly and voluntarily entered into, the waiver of appeal rights will be upheld. *See United States v. Whitlow,* 287 F.3d 638, 640 (7th Cir. 2002). However, the waiver of the right to appeal does not completely prevent review, as a defendant may argue that the waiver was unknowingly made and is therefore

invalid. *See United States v. Rhodes,* 330 F.3d 949, 952 (7th Cir. 2003). An opinion from this court would enunciate a rule of law that is applicable in Wisconsin when the State obtains the waiver of a defendant's appeal rights as part of a plea agreement.

Second, in *State v. Moran,* 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 884, we concluded that "the plain language of Wis. Stat. § 974.07(6) gives a movant the right to conduct DNA testing of physical evidence . . . at his or her own expense." *Id.*, ¶3. While there are very minimal conditions that a movant is required to meet for such testing under § 974.07(6), we have not determined whether a plea such as that entered into by Bembenek waives the right to DNA testing. Therefore, we should accept her petition for review to decide whether, subsequent to her plea, Bembenek retains the right to DNA testing pursuant to § 974.07(6), if she pays for the tests. I note that on our recent remand, the circuit court failed to follow our directive and determine whether Bembenek had the right to further DNA testing *if she paid for the tests.* Instead of making that determination, the circuit court accepted the State's position that Bembenek had to prove an entitlement to those tests under 974.07(7). Section 974.07(7) *does not apply* when a defendant seeks DNA testing at her own expense. Section 974.07(6) applies. *Moran,* 284 Wis. 2d 24, ¶3.

Accordingly, because I would grant Bembenek's petition for review, I dissent from its denial.

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David R. Schanker
Clerk of Supreme Court